



STATE MINING AND GEOLOGY BOARD

EXECUTIVE OFFICER'S REPORT



ARNOLD
SCHWARZENEGGER
GOVERNOR

For Meeting Date: February 5, 2009

Agenda Item No. 11: Consideration for Issuance of a 45-Day Notice to Correct Deficiencies to the County of Butte.

INTRODUCTION: Butte County (County) is located in the Central Valley of the state of California, north of the state capital, Sacramento. As of 2005, the County had a population of 214,185. The county seat is Oroville. In June 2007, the State Mining and Geology Board (SMGB) received a public complaint from a land owner adjacent to a surface mining operation referred to as the New Era Mine (CA Mine ID #91-04-0031). The complaint alleges that the County, acting as a lead agency under the Surface Mining and Reclamation Act of 1975 (SMARA), has failed in its responsibilities and obligations under SMARA, and failed to take appropriate administrative and enforcement actions. A preliminary review of the current status for all surface mines located within the County's jurisdiction was performed and is summarized herein.

STATUTORY AUTHORITY: Pursuant to Public Resources Code (PRC) Section 2774.4(a),

"If the board finds that a lead agency either has (1) approved reclamation plans or financial assurances which are not consistent with this chapter, (2) failed to inspect or cause the inspection of surface mining operations as required by this chapter, (3) failed to seek forfeiture of financial assurances and to carry out reclamation of surface mining operations as required by this chapter, (4) failed to take appropriate enforcement actions as required by this chapter, (5) intentionally misrepresented the results of inspections required under this chapter, or (6) failed to submit information to the department as required by this chapter, the board shall exercise any of the powers of the lead agency under this chapter, except for permitting authority."

BACKGROUND: During its regular business meeting held on January 11, 2007, the SMGB received from staff a preliminary report on the review of overall SMARA lead agency performance. The information presented was subsequently published on the SMGB's website as Information Report 2007-01 and titled "Report on SMARA Lead Agency Performance."

Pursuant to the SMGB's Administrative Procedure No. PP96-02, when the SMGB receives a public complaint pertaining to the overall performance of a lead agency under SMARA, a



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determination is quickly made as to whether immediate action is required. Immediate action is defined as a “*situation where a lead agency does not act to assure SMARA compliance and irreparable environmental damage or substantial endangerment to the public health appears imminent.*” When immediate action is not considered necessary, a technical review by the Department of Conservation, Office of Mine Reclamation (OMR) and/or discussion of the violation(s) at the SMGB’s next Regular Business Meeting may be undertaken.

In the past, the SMGB has taken the opportunity to invite the lead agency to provide an overview of their SMARA program during this process. The SMGB received a written public complaint dated August 12, 2008, from the Dry Creek Coalition alleging that the County, acting as a lead agency under the SMARA, has failed in its responsibilities and obligations, and failed to take appropriate administrative and enforcement actions for the New Era Mine (CA Mine ID #91-04-0031). The Executive Officer discussed the overall obligations and responsibilities of a lead agency pursuant to SMARA via a conference call on November 6, 2008, and met with the County on January 14, 2009.

ANALYSIS: In review of the OMR SMARA database (Section 1.0 of the SMGB packet), materials produced from surface mining operations located in Butte County include sand and gravel, rocks, silica, fill dirt, rare earth elements, and gold (lode). Based on 2007 information provided by the County, there are 22 surface mines, of which 16 are active, three are idle, one is abandoned, and one has not commenced operations. OMR notes the County to have 26 mines within its jurisdiction, of which 18 are currently active, two newly permitted, and six noted as idle.

A preliminary review of the current status for all surface mines located within the County’s jurisdiction was performed. In particular, certain parameters indicative of overall SMARA lead agency performance were evaluated. These parameters reflect upon those minimal activities required by all SMARA lead agencies such as conduct of inspections at least once each calendar year, review and adjustment of financial assurance cost estimates, and enforcement actions. Also noted were substantial deviations from the approved reclamation plan, and those mines initially reported as idle that have since become abandoned, whether that was the operator’s intent or not (i.e., no Interim Management Plan (IMP) in place). In addition, the average remediation cost per disturbed acre was evaluated to serve as a general indicator as to whether such costs are reasonable or otherwise significantly lower than amounts established elsewhere throughout the state.

SMARA Mine Inspections: Pursuant to PRC Section 2774(b), SMARA requires that all surface mines be inspected at least once each calendar year. As reported in the SMGB’s Information Report 2007-01, as of 2005, about 72 percent of the surface mines within the County’s jurisdiction were inspected, with about 88 percent of the surface mines having been inspected in 2007. As of 2007 and 2008, the County has reported that all surface mines within its jurisdiction have been inspected.



Financial Assurance Annual Review and Adjustment: Pursuant to PRC Section 2773.1(a)(3) SMARA requires that the financial assurance cost estimate (FACE) for each surface mining operation be reviewed and adjusted annually, as appropriate. As reported in the SMGB's Information Report 2007-01, as of 2005, about 20 percent of the financial assurances had been reviewed, with about 69 percent of the sites having had their financial assurances updated in 2007. In 2006, only two sites had adjusted financial assurance cost estimates. The County reports that for 2007-2008, revised financial assurance cost estimates were submitted to OMR for 19 surface mines. The remaining sites were in the process of having their respective FACEs revised.

Reclamation Cost per Disturbed Acre: OMR has historically used \$5,000 per acre as a general and reasonable cost for reclamation of land disturbed by surface mining with a proposed end use as open space. For 2007, the average cost per acre County-wide is on the order of \$3,793, which is up from \$212 per acre in 2005. This dollar amount may currently be slightly higher based on recently adjusted FACEs.

Enforcement: A preliminary evaluation of enforcement related activities was reviewed in regards to commencement of reclamation in situations where a mine characterized as idle became abandoned, in situations where no IMP was submitted by the operator and subsequently approved by the County.

Idle Mines: As of 2008, five mines are noted as idle.

- Mathews Ready Mix – State Land (CA Mine ID #91-04-0008) is reported as idle since 2005. The County reported that the operator had prepared an IMP, and that the County was negligent in not forwarding a copy to OMR. Such copy has since been forwarded to OMR.
- Carr Mine (CA Mine ID #91-04-0013) is reported as idle since 2005. Site is abandoned and the County has implemented enforcement actions via seizing of the financial assurance mechanism, albeit such amount is inadequate for reclamation purposes. The County reported that enforcement action needs to be implemented.
- Almond Avenue Mine (CA Mine ID #91-04-0018) is reported as idle since 2005. An approved IMP is in place for this site. The County reported that it was negligent in forwarding approval of an extension of the IMP to OMR. Such documents have since been forwarded to OMR.

- Blue Lead Mine (CA Mine ID #91-04-0020) is reported as idle since 2005. Preparation of an IMP is in process; however, it remains uncertain if the site is already deemed abandoned pursuant to SMARA. The County reported that it has informed the operator that reclamation needs to commence, and the FACE requires immediate adjustment.
- Permit #92-43 Vance Avenue Pit #2 (CA Mine ID #91-04-0021) is reported as idle since 2005. An approved IMP may be in place. A request by OMR to the County for copies of pertinent documents has been made. The County reported it approved an IMP in 2006, and that the County was negligent in not forwarding a copy to OMR. Such copy has since been forwarded to OMR.

AB 3098 Status: OMR periodically publishes a list of mines regulated under SMARA that meet provisions set forth under PRC Section 2717(b). This list is generally referred to as the AB 3098 List, in reference to the 1992 legislation that established it. Sections 10295.5 and 20676 of the Public Contract Code preclude mining operations that are not on the AB 3098 List from selling sand, gravel, aggregates or other mined materials to state or local agencies. For OMR to place a mining operation on the AB 3098 List, the surface mining operation must meet all of the following conditions:

- The operation has an approved reclamation plan;
- The operation has an approved financial assurance;
- The operation has filed its annual report;
- The operation has paid its reporting fee; and
- The operation has had its annual inspection by the lead agency which reflects the operation is in full compliance with the law.

The surface mining operation may be on the AB 3098 List if it has a pending appeal with the SMGB regarding its reclamation plan or financial assurance, provided its appeal has not been pending for more than 180 days.

The number of surface mining operations on or off the AB 3098 list can be indicative of overall site compliance. In Butte County, 38 percent, or 10 surface mining operations, are not listed, and thus, are presumed to be deficient in one or more of the conditions outlined above. A total of 9 surface mine sites are listed on the AB 3098 List.

Comparison with Other Lead Agencies: As noted in the SMGB's Information Report 2007-01 pertaining to SMARA lead agency performance, it was noted, based on 2005 data, that statewide performance of lead agencies in the area of performing inspections of surface mine sites within their respective jurisdiction, at least once each calendar year, is moderate, with the overall quality of such inspections inferred to be poor. Lead agency performance in the annual review and adjustment of financial assurances was poor, averaging 29 percent compliance, with 91 percent of the lead agencies performing below 50 percent compliance. Furthermore, as of 2002, overall financial assurances were un-realistically low. Enforcement of SMARA in regard to enforcement of IMPs was deemed almost non-existent.

In regard to overall performance of the County as a SMARA lead agency in 2007 in comparison with other lead agencies, current evaluation indicates:

- The County is performing above the state average in regards to inspections (88 percent of the sites within the County's jurisdiction are in compliance in comparison to the state average of 66-75 percent as of 2005).
- The County is performing significantly above the state average in regard to annual review and adjustment of financial assurances (69 percent of the sites within the County's jurisdiction in comparison to the state average of 29 percent).
- An evaluation of the reclamation cost per acre of disturbed land as reported by the operators on their respective annual reports reveals low dollar amounts. This is reflective of inadequate review and adjustment of the financial assurance amount, albeit consistent with such evaluation of the cost per acre set aside for reclamation statewide.

General Comments Regarding Inspection Reports: A review of the 2006 and 2007 inspection reports was performed by the Executive Officer. In particular, a review of mine inspection reports for the New Era Mine (CA Mine ID #91-04-0031) was performed for the years 2007 and 2008 (Sections 2.0 and 3.0 of the SMGB packet). The following general comments pertain to adequacy of inspection reports and emphasize areas that could be improved to benefit the County in facilitating its SMARA program in an efficient and effective manner:

CCR Section 3504.5(f) of the SMGB's regulations state:

"Inspections may include, but shall not be limited to the following: the operation's horizontal and vertical dimensions; volumes of materials stored on the site; slope angles of stock piles, waste piles and quarry walls; potential geological hazards; equipment and other facilities;



samples of materials; photographic or other electronic images of the operation; any measurements or observations deemed necessary by the inspector or the lead agency to ensure the operation is in compliance with Public Resources Code Chapter 9.”

CCR Section 3504.5(g) also states “*The inspection report to the lead agency shall consist of the inspection form MRRC-1...and any other reports or documents prepared by the inspector or inspection team...The lead agency shall provide a copy of the completed inspection report along with the lead agency’s statement regarding the status of compliance of the operation to the director within 30 days of completion of the inspection... ”*

Adequate inspection reports are the foundation upon which a determination for adjusting the financial assurance is made and how administrative and compliance/enforcement actions to be considered by the lead agency (County) are clearly identified. The following general observations are offered:

- Reference to Compliance/Enforcement Triggers: The inspection reports contained either to reference, or in some cases inadequate reference, to reclamation or performance requirements as set forth in the approved reclamation plan, Conditions of Approval, or permit requirements. The inspection reports will benefit if specific performance standards and conditions noted in the approved reclamation plan and Conditions of Approval are specifically referenced and/or quoted (i.e., all slopes should not be steeper than 2H:1V). Without such references, the inspection report upon review fails to assure the lead agency that the site conditions meet the requirements of the approved reclamation plan, Conditions of Approval, and permit requirements. It should be noted that some sites have numerous Conditions of Approval, many of which are directly relevant to reclamation such as steepness of slopes, setbacks, safety requirements, and revegetation performance standards.
- Quantification of Site Conditions: SMGB regulations (CCR Section 3504.5(f)) states that “*Inspections may include, but shall not be limited to the following: the operation’s horizontal and vertical dimensions; volumes of materials stored on the site; slope angles of stock piles, waste piles and quarry walls; potential geological hazards; equipment and other facilities; sample of materials; photographic or other electronic images of the operation; any*



measurements or observations deemed necessary by the inspector or the lead agency to ensure the operation is in compliance with Public Resources Code Chapter 9.” Issues associated with slopes that typically need to be addressed include over-steepened and/or unstable slopes, and potential safety hazards. Inspection reports need to quantify the current configuration of cut slopes and reclaimed slopes, including certain geologic parameters such as existing height of slopes and steepness or gradient, quantification of erosion features, amount of off-site encroachment, and volume of waste piles. Such reports did not include such information.

- Adequate Identification of Violations: Should a violation or substantial deviation from the existing approved reclamation plan or any Conditions of Approval is determined at time of inspection (i.e., encroachment of disturbed land beyond the reclamation plan boundary), a violation should be noted at time of inspection. The County can then determine upon review of the inspection report whether enforcement or other compliance actions are warranted. Without specific violations being noted, the County acting as the SMARA lead agency is not in a position to consider and implement the appropriate SMARA compliance/enforcement action. The inspection reports were deficient in this regard.
- Annotated Images: The inspection reports will benefit if annotated photographs showing general site conditions and operations, and notably, specific areas of concern (i.e., violations, corrective measures and recommendations) are included. Such images are currently being incorporated in the most recent inspection reports.

OTHER CONSIDERATIONS: Butte County came to the attention of the SMGB via a public complaint from the Dry Creek Coalition (Section 5.0 of the SMGB packet). The Coalition’s complaint centered on events involving New Era Mine (CA Mine ID #91-04-0031). A review of inspection reports prepared for the New Era Mine and related administrative actions taken by the County raises questions and concerns regarding the County’s overall performance as a SMARA lead agency.

According to information provided by the County, the County’s Department of Development Services and Public Works, (DDS) became aware of extensive site disturbance at New Era in October of 2007. On December 5, 2007, DDS staff conducted an inspection and observed approximately 12 acres of disturbed land representing roughly 100,000 cubic yards of displaced soil and rock. Staff from DDS reviewed their records and determined that Butte

County's Planning Commission approved Use Permit (UP) 81-135 and an associated reclamation plan on May 20, 1982. Prior to December 2007 the owners and operators had not submitted annual production reports, annual financial assurance adjustments or any indication of a mine operating as permitted under UP 81-135 to either DDS or the Department of Conservation. Correspondingly, the County did not conduct any annual inspections until December 2007. Ultimately, a revised Notice of Violation and Order to Comply was issued to the operator on February 11, 2008.¹

On April 21, 2008, following a public hearing, the Planning Commission determined that New Era Mine was in violation of SMARA in certain respects, including failure to have a permit and reclamation plan consistent with the scope of the current mining operations. The mining operator appealed the Planning Commission's decision to the Butte County Board of Supervisors. Following a public hearing, and based on affidavits, invoices and other evidence submitted by the mining operator, reversed the Planning Commission and found that the 1982 permit and reclamation plan remain in effect.

Subsequently, a mine inspection performed by OMR on August 22, 2008, reported eight (8) violations and seven (7) corrective measures. Accordingly, OMR issued a 15-Day Notice to the County. Despite these two inspections, when County staff inspected the site on October 29, 2008, no violations were noted. No information is provided demonstrating that the mining operator had corrected the violations previously noted. Some of the violations may have been corrected; however, a review of the October 29, 2009 inspection report shows in Photo No. 22 a pond located on adjacent property. Correspondence provided by OMR, including OMR's 15-Day SMARA Enforcement Notice to the County dated October 24, 2008 and the County's Response to the 15-Day SMARA Enforcement Notice, dated December 12, 2008, also suggest that, although some violations may have been addressed, many were not adequately addressed. These correspondences are included in Section 3.0 of the SMGB packet. A chronology of events and administrative actions taken by the County, pertaining to New Era Mine, is provided in Section 4 of the SMGB.

It is important to note that the Board of Supervisors' decision, and OMR's Notice of Violation, is the subject of separate law suits currently pending in Butte County and Sacramento County, respectively.

¹ The details of the issues addressed in the Order to Comply are numerous and a complete chronology of the site is extensive; therefore, we have not attempted to summarize them here. However, see Section 4 of the SMGB packet.

Although the overall performance by the County as lead agency is above average compared with lead agency performance state-wide, the facts and circumstances surrounding New Era Mine indicate that further investigation and review of the County's performance may be warranted.

FINDINGS: The following findings are offered:

- The County is performing above the state average in regards to inspections (88 percent of the sites within the County's jurisdiction in comparison to the state average of 66-75 percent as of 2005). Review of inspection reports for 2007 and 2006 reveal that they are for the most part significantly inadequate due to the absence of quantitative information, and compliance triggers. If the inspection reports are deemed inadequate, then there is no reliability or acceptable degree of comfort in the estimated financial assurance cost estimate, and no means to determine what enforcement or compliance actions should be considered by the County.
- The County is performing significantly above the state average in regards to annual review and adjustment of financial assurances (69 percent of the sites within the County's jurisdiction in comparison to the state average of 29 percent).
- An evaluation of the reclamation cost per acre of disturbed land as reported by the operators on their respective annual reports reveals low dollar amounts. This is reflective of inadequate review and adjustment of the financial assurance amount, albeit consistent with such evaluation of the cost per acre set aside for reclamation statewide.
- In regards to the County's efforts to enforce SMARA, two surface mining operations have reported disturbed acreage in excess of the amount of acreage set forth in their respective approved reclamation plan. Overall, about 43 acres outside the approved reclamation plan footprint for seven sites are reported as disturbed. In addition, two sites, at minimum, may be deemed abandoned, and thus past the deadline for implementation of an IMP; OMR is working with the County to clarify the status of these two sites.
- The number of surface mining operations on or off the AB 3098 list can be indicative of overall site compliance. Thirty-eight percent, or 10 surface mining operations, are not listed, and thus, are presumed to be deficient in one or more of the conditions outlined above. A total of 16 surface mine sites, or 62 percent of all sites within the County, are listed on the AB 3098 list.



- This County came to the attention of the SMGB via a public complaint form the Dry Creek Coalition in regards to the New Era Mine (CA Mine ID #91-04-0031). This approximately 18 acre site is a gold mining operation. The County's Board of Supervisor's found earlier this year that the mine had been in continuous operation since it was permitted in 1982, though the County had never inspected the mine, required a financial assurance, nor required an annual mine report previous to 2007. The operator is currently in litigation with the Department over a site inspection, and with the mine's neighbors. OMR is continuing the enforcement process on the operation.

EXECUTIVE OFFICER'S RECOMMENDATION: A SMARA lead agency need only fail in one of the six conditions set forth pursuant to PRC Section 2774.4(a), for the SMGB to consider commencement of the administrative process toward assumption of the lead agency's SMARA responsibilities and obligations, excluding permitting authority. It is the Executive Officer's opinion that the County over the past two years has taken significant steps to improve its overall SMARA program. Thus, based on review of the administrative record before the Executive Officer, it is the recommendation of the Executive Officer conduct a thorough review of mine inspection reports, and conduct on-site visits, as appropriate and deemed necessary. Upon completion, the Executive Officer will report back to the SMGB, and the SMGB can consider issuance of a 45-Day Notice of Deficiencies, if deemed necessary.

SUGGESTED MOTION LANGUAGE: The SMGB may consider the following motion language:

[Should the SMGB determine that the County is making significant progress, and that no deficiencies and violations exist, the following motion can be considered.]

Mr. Chairman, I move that the SMGB, in light of the evidence presented before the Board today and contained in the Executive Officer's Report, find that the County is making a good faith effort in fulfilling its responsibilities and obligations as a Lead Agency under SMARA, and that the Board not consider issuance of a 45-Day Notice of Deficiencies.



[or]

[Should the SMGB determine that the County is making significant progress, but certain deficiencies and violations remain uncorrected, the following motion can be considered.]

Mr. Chairman, I move that the SMGB, in light of the evidence presented before the Board today and contained in the Executive Officer's Report, find that the County is making a good faith effort in fulfilling its responsibilities and obligations as a Lead Agency under SMARA, but significant deficiencies may persist, and that the Executive Officer conduct a thorough review of mine inspection reports within the jurisdiction of Butte County, and conduct on-site visits, as appropriate and deemed necessary. Upon completion, the Executive Officer will report back to the SMGB, and the SMGB can consider issuance of a 45-Day Notice of Deficiencies, if deemed necessary.

[or]

[Should the SMGB determine that deficiencies and violations remain uncorrected and the County is failing to make progress, the following motion can be considered.]

Mr. Chairman, I move that the SMGB, in light of the evidence presented before the Board today and contained in the Executive Officer's Report, direct the Executive Officer to issue a 45-Day Notice to Correct Deficiencies to Butte County pursuant to Public Resources Code Section 2774.4(a)(c).

Respectfully submitted:

Stephen M. Testa
Executive Officer